

High Treason in Germany – Rebellion in Spain

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Carles Puigdemont, the fugitive former President of Catalonia wanted by Spanish law authorities, has been arrested in Germany. This is no time to judge what happened from the point of view of politics or strategy. The only perspective that matters right now is the judicial, or in other words, the legal one.

In order to obtain the transfer of the criminal suspect, the Spanish Judge of the Supreme Court Pablo Llarena has issued an European Arrest Warrant (EAW) in which he will request the transfer of Puigdemont for the crimes of rebellion and embezzlement at least. The EAW will be received by the *Oberlandesgericht* of Schleswig, i.e., by the superior court of the federal state in which Puigdemont has been arrested. This court will decide on the transfer of the suspect within a maximum period of 60 days, although the term of the actual transfer may be extended for various reasons up to approximately one year at the most, but this is not the most common case.

The EAW, which is the result of the mutual trust between European judges, allows the immediate and fast transfer of the suspect without a thorough examination by the judge of the country in which the suspect is arrested. But this is only the case with a very restrictive list of enumerated crimes, of which rebellion is not a part, and embezzlement only with a considerable effort of interpretation.

In the case of rebellion, since that crime is not on the aforementioned list, the judge must undertake a more accurate analysis of the facts that the suspect is accused of, in order to decide if they constitute a crime in the judge's country. In the case of Germany, the rules of the Penal Code to be analyzed are 81 (high treason) and 105 (coercion against constitutional bodies). The first describes a behaviour analogous to the crime of rebellion in Spain. The second refers to forcing constitutional bodies not to perform their functions or to do so in a certain sense. Both crimes are punished with serious penalties, although in practice they are somewhat milder than Spanish ones.

Both crimes have in common that the behavior described must be carried out with "violence" or "threat of violence". But as German case law shows, not any sort of violence is enough, but only violence massive enough to really change the will of the authorities, both from a physical point of view against people or – more difficultly – things (*vis absoluta*), or in an intimidatory sense, that is, the "threat of violence" (*vis compulsiva*). According to German case law, even a massive general strike fits the bill only as long as it does damage to the population in a relevant way and implies a display of force, as it would be the case with drastic interruptions of essential supplies.

Therefore, a simple strike or the failure to provide a basic service does not match the conditions of the concept of violence according to German case law. Nor do massive demonstrations without any kind of incident or very few incidents. The mere possibility that

incidents or riots would occur is not enough to claim the existence of “violence”, unless the suspect had directly threatened with them.

All these considerations do not mean, at all, that Puigdemont will not be transferred by the German judges. It cannot be ruled out that the German judges will interpret the concept of violence in a similar way as the Spanish Judge has done. In fact, the concept of “violence” has suffered repeated – and very controversial – extensions of its range in Germany in the last forty years. Furthermore, as it was in my opinion the case in Spain, the German judges might also acknowledge the imminent threat to the integrity of a State, a value so essential in Germany that *Einigkeit* (unity) is the first word of its National Anthem. This could possibly bring the German judges to see “violence” where, in my opinion and that of so many others, there never was any. By the way, it would be very counterproductive to the interest of all the suspects if that violence were to occur from now on.

The law is not a mathematical operation. It is influenced by ideologies and emotions, as any other action of human beings. Anyway, ideology or emotions can never be the jurists’ only or principal guide when reasoning in legal terms.

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